**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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| CONSOLIDATED RAIL CORP. | : | CIVIL ACTION |
| | : | |
| v. | : | |
| | : | |
| CANADA MALTING CO., LTD. | : | |
| | : | NO. 98-5984 |

**MEMORANDUM AND ORDER**

YOHN, J. July , 1999

Consolidated Rail Corporation ("Conrail") filed this action seeking damages from Canada Malting Company, Ltd. ("Canada Malting") for freight charges resulting from the transport of malt by interstate rail from Allentown, Pennsylvania to Chapman, Pennsylvania. Before this court are the parties' cross-motions for summary judgment which seek to resolve whether Canada Malting owes Conrail unpaid shipping costs.[1] After considering the parties' cross-motions for

[1]Conrail titles its motion a "Motion for Partial Summary Judgment," while Canada Malting titles its motion a "Motion for Summary Judgment." Both parties, however, ask the court to grant only partial summary judgment. Conrail seeks to recover freight charges from Canada Malting arising from the transportation of malt by interstate rail to three separate locations: Utica, New York; Pottsville, Pennsylvania; and Chapman, Pennsylvania. See Plaintiff Conrail's Memo. of Law in Support of its Motion for Partial Summary Judgment at 1 & 1 n.1-n.2 ("Conrail's Memo."). Conrail's motion, however, requests summary judgment only for freight charges arising from the transport of malt to Chapman, Pennsylvania. See id. Similarly, although on its face it appears to request complete summary judgment, Canada Malting also only seeks judgment as to cost of shipping malt from Allentown to Chapman. See Reply to Opposition of Plaintiff, Conrail's Memo. of Law in Opposition to Motion for Summary Judgment at 4 n.5 ("Canada Malting's Reply to Conrail's Opp."). Thus, in actuality, both parties are requesting only partial summary judgment.

summary judgment, Conrail's supplement to its memorandum, and the responses, replies, and sur-replies thereto, I conclude that, because the case involves disputed factual issues, this court cannot grant summary judgment for either party.

## FACTUAL BACKGROUND

The following facts are uncontested unless stated otherwise: In January, 1997, Canada Malting was considering whether to enter a contract with The Stroh Brewery Company ("Stroh's"), in which Canada Malting would agree to supply Stroh's with malt from Canada Malting's Thunder Bay, Ontario facility. See Declaration of Brent Atthill ("Atthill Dec.") at ¶¶ 6-7, 9 & Ex. B. Pursuant to this contract, the malt would be sold on a "delivered basis," meaning that Canada Malting would be responsible for transporting the malt by interstate rail from its facility in Thunder Bay, Ontario, to Stroh's brewing facility. At the time it was negotiating the contract with Stroh's, Canada Malting was under the incorrect impression that the Stroh's facility was located in Allentown, Pennsylvania. See Deposition Transcript of Brent Atthill ("Atthill Tr.") at 19. The Stroh's facility actually is located in Chapman, Pennsylvania, which is approximately eight miles from Allentown. See Atthill Dec. ¶ 10; Atthill Tr. at 19. Operating under this mistaken belief, Brent Atthill of Canada Malting contacted Christine Semenchuk of Canadian Pacific Railways ("Canadian Pacific") to arrange for the shipment of the malt to Allentown. See Atthill Tr. at 18; Deposition Transcript of Christine Semenchuk ("Semenchuk Tr.") at 21, 23, 37, 54. Semenchuk quoted Atthill a rate of $2,989 per rail car for direct delivery by Canadian Pacific from Thunder Bay, Ontario to Allentown. See Atthill Dec. ¶ 8 & Ex. A. On January 27, 1997, on the basis of this quotation, Canada Malting entered into the contract with Stroh's.

In February, 1997, Canadian Pacific informed Canada Malting that it would be unable to deliver the malt directly to the Stroh's facility in Chapman, and a local Conrail switch would be necessary to move the rail cars from Allentown to Chapman. See Atthill Dec. ¶ 10 & Ex. C; Atthill Tr. at 21. Semenchuk of Canadian Pacific then contacted Charles J. Ciotti of Conrail. See Affidavit of Charles J. Ciotti ("Ciotti Aff.") ¶ 2. The parties dispute the content of this conversation. Canada Malting claims that Ciotti advised Semenchuk that the "charge for moving each car from the [Canadian Pacific]-Conrail interchange point in Allentown to Stroh's would be $350.00." See Atthill Dec. ¶¶ 11 & 12 & Ex. D; Semenchuk Tr. at 25-26. Conrail contends that Semenchuk inquired as to the possibility of Conrail transporting a "few rail cars" from Allentown to Chapman, and that Ciotti offered to move these few "straggler" rail cars as a "courtesy" for a rate of $350 per car. See Ciotti Aff. ¶¶ 2-3. It is undisputed, however, that to the extent an agreement was reached between Conrail and Canada Malting for the transport of the rail cars from Allentown to Chapman, it was never reduced to writing. See id. at ¶¶ 3-5, 24; Semenchuk Tr. at 28.

From April through July, 1997, approximately 30-40 cars containing malt were transported from Canada Malting to the Stroh's facility in Chapman through use of both the Canadian Pacific and Conrail rail lines.[2] See Atthill Dec. ¶ 15. Conrail invoiced Canada Malting $350 for each of these shipments and Canada Malting paid Conrail in full.

On July 11, 1997, Semenchuk informed Atthill that Conrail had advised her that, beginning on July 14, 1997, Conrail was going to begin charging a rate in excess of $1700 per

[2]Although both parties agree that malt cars were transported between April and July, 1997, the exact number of cars transported is in dispute.

car to transport them to Chapman.[3] See Semenchuk Tr. at 72-77, 79. On July 16, 1997, Ciotti sent an electronic mail message to Semenchuk, confirming that Conrail would be charging a rate higher than $350, effective July 14, 1997. See Ciotti Aff. ¶ 13; Semenchuk Tr. at 78-79.

Atthill told Ciotti that Canada Malting was committed to a contract to supply malt to Stroh's through the end of the year at a price that did not permit it to absorb a five-fold increase in Conrail's rate. See Atthill Dec. ¶ 18; Atthill Tr. at 31. Ciotti explained to Atthill that the rate change was necessary because Canadian Pacific allegedly had misrepresented the terms of the transportation of Canada Malting's shipments by Conrail. See Atthill Tr. at 31. According to Ciotti, Semenchuk had asked for a rate to switch a few "stray" cars that had been sent mistakenly to Allentown in January. See Atthill Dec. ¶ 19.

Despite this conversation between Conrail and Canada Malting, Canada Malting continued to ship approximately 66-70 cars containing malt to Stroh's from July through December, 1997, and continued to utilize Conrail's switching services from Allentown to Chapman to do so. See Atthill Dec. ¶ 21; Atthill Tr. at 33; Ciotti Aff. ¶ 18. Conrail billed each car at the higher rate of $1700 per car, but Canada Malting continued to pay the $350 rate. See Ciotti Aff. ¶ 20; Atthill Tr. at 33-34. Conrail accepted these payments and continued to switch

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[3]Canada Malting contends that the $1700 rate is applicable to the transportation of malt rail cars from Buffalo, New York to Chapman, Pennsylvania because Conrail insisted that malt rail cars be interchanged in Buffalo. See Memo. of Points and Authorities in Support of Canada Malting Co., Ltd.'s Motion for Summary Judgment ("Canada Malting's Memo.") at 2-3; Memo. in Opposition to Motion of Consolidated Rail Corp. for Partial Summary Judgment ("Canada Malting's Opp.") at 9. On the other hand, Conrail asserts that the $1700 rate is determined by the "number of miles a rail car travels, and the weight of the rail car" as established by Item 9200 of Conrail's Malt Transportation Tariff CR-4195. See Plaintiff Consolidated Rail Corp.'s Sur-Reply Memo. In Opposition to Defendant Canada Malting Co., Ltd.'s Cross Motion for Summary Judgment and In Support of its Motion for Summary Judgment ("Conrail's Sur-Reply") at 4-5.

and transport the cars from Allentown to Chapman between July and December, 1997.

A factual dispute exists between the parties as to the amount that Canada Malting owes to Conrail if, in fact, Conrail is owed anything by Canada Malting.[4] Canada Malting has, however, agreed to accept Conrail's calculation of the amount due for the purpose of this motion only. See Canada Malting's Memo. at 4 n.2. Thus, for the purpose of this motion only, the court will accept as true Conrail's calculation of the amount owed to it, if any, in unpaid freight costs.

## STANDARD OF REVIEW

The parties have filed cross-motions for summary judgment. Summary judgment is to be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The court should not resolve disputed factual issues, but rather, should determine whether there are factual issues which require a trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). Where, as here, the parties have filed cross-motions for summary judgment, "Rule 56(c) does not mean that the case will necessarily be resolved at the summary judgment stage . . . . Each party must still establish that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law." Atlantic Used Auto Parts v. City of Philadelphia, 957 F. Supp. 622, 626 (E.D. Pa. 1997). If no factual issues exist and the only issues before the court are legal, then

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[4]Conrail seeks to recover $97,393.96 in unpaid freight costs for shipments made from Allentown to Stroh's in Chapman, Pennsylvania. See Conrail's Memo. at 2, 8, 11-12; Plaintiff Conrail's Memo. of Law in Opposition to Defendant Canada Malting Co., Ltd.'s Motion for Summary Judgment ("Conrail's Opp.") at 2, 15-16. On the other hand, Canada Malting contends that if any additional payments are due to Conrail, the total due is only $89,794.23. See Canada Malting's Memo. at 3- 4; Canada Malting's Opp. at 4-5.

summary judgment is appropriate. See Sempier v. Johnson & Higgins, 45 F.3d 724, 727 (3d Cir.), cert. denied. 515 U.S. 1159 (1995).

In this case, the record reveals several contested factual issues that are material to the current dispute. Summary judgment is, therefore, not appropriate, and both motions will be denied.

## DISCUSSION

The main issue in this case is whether the parties had an enforceable agreement in which Conrail agreed to transport Canada Malting's rail cars on a long-term basis from Allentown to Chapman at a rate of $350 per rail car.

Conrail argues that no such agreement existed for two reasons. First, Conrail contends that any such agreement would only be enforceable if it was reduced to writing. See Conrail's Memo. at 10. Conrail argues that in the absence of a written contract, the tariff rate[5] automatically applies and is enforceable against Canada Malting despite any contrary oral agreement made by Conrail. See id. Second, Conrail contends that, even if an oral agreement is enforceable, no such oral agreement was ever reached between Conrail and Canada Malting. Conrail claims that it never manifested an intention to be bound to a long-term contract to transport malt at $350 per rail car and, thus, no contract was ever formed between the parties. See Conrail's Opp. at 8-9. Canada Malting, on the other hand, argues that an oral contract

[5]The tariff rate refers to the rate that is established by the rail carrier and made available to the public for inspection. See 49 U.S.C. § 11101(b). Unlike its predecessors, the current statute does not require a rail carrier to file its tariff rate with the Surface Transportation Board. See id.; see also Plaintiff's Supplemental Memo. in Connection with Plaintiff's Motion for Summary Judgment ("Conrail's Supp. Memo.") at 1 (acknowledging that the tariff rate is no longer filed with the Surface Transportation Board).

between the parties is enforceable and contends that the parties did form such a contract. See Canada Malting's Memo. at 6-7, 9.

**A. Does a Contract Between a Rail Carrier and a Purchaser of Rail Services Need to be in Writing to Supersede a Tariff Rate?**

In this case, neither party contends that a rail carrier lacks the statutory authority to enter into a private contract with a purchaser of rail services. In fact, Canada Malting's position rests entirely on this supposition. See Canada Malting's Memo. at 6-7 ("The agreement between Canada Malting and Conrail for switching the cars . . . at a price of $350 per car is enforceable under Pennsylvania contractual law as both parties manifested an intention to be bound by sufficiently definite terms the contract was performed and consideration was repeatedly exchanged between the parties in accordance with the agreed terms."). Conrail also concedes this point by arguing that:

> A shipper and rail carrier can enter into a rail carriage agreement for the transportation of agricultural products . . . in one of two ways: (1) Pursuant to a written contract to provide specific services under specific rates and conditions . . . [or] (2) Pursuant to the terms of the rail carrier's published common carrier rates, schedule of rates and service terms.

See Conrail's Memo. at 10.[6]

Therefore, Conrail admits that one way a rail carrier and a purchaser of rail services can form a valid agreement is through a private contract between the parties.

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[6]Thus, Conrail does not argue that the filed tariff doctrine, which prohibits a regulated entity from charging a rate different than the rate filed with the appropriate regulatory agency under any circumstances, applies here. See American Tel. and Tel. Co. v. Central Office Tel., 118 S. Ct. 1956, 1962-63 (1998) (explaining filed tariff doctrine). Conrail concedes that the tariff rate can be altered by private agreement, but to do so, Conrail argues, the agreement must be in writing.

See id. This proposition is supported by 49 U.S.C. § 10709(a), which provides that: "(a) One or more rail carriers providing transportation subject to the jurisdiction of the Board under this part may enter into a contract with one or more purchasers of rail services to provide specified services under specified rates and conditions." 49 U.S.C. § 10709(a) (1997); see also Dow Chem. Co. v. Union Pacific Corp., 8 F. Supp. 2d. 940, 941 (S.D. Tex. 1998) ("It is clear that the purpose of § 10709 is to allow parties the ability to alter federal mandates, or to avoid federal control and oversight over rail contracts.").

Conrail argues, however, that to be valid, the agreement between the rail carrier and the purchaser of the rail services must be in writing. See Conrail's Memo. at 11. Conrail further contends that if no such written contract exists, then the tariff rates established by the rail carrier automatically govern the rate applicable to the shipment of the goods at issue. See id. (arguing that "[a]bsent a written contract between the parties, any movements of malt provided by Conrail (including the fee defendant must pay for Conrail's services) are governed pursuant to statute by Conrail's Malt Transportation Tariff CR-4195"). As support for this argument, Conrail cites 49 U.S.C. § 10709(d) and 49 U.S.C. § 11101(d). See id.; Conrail's Opp. at 14-15. The court finds, however, that neither statutory section cited by Conrail supports its position that an oral contract governing the provision of rail services is per se invalid. Moreover, nowhere in § 10709 is it required that the private contract be in writing, and Congress could certainly have easily so provided if it intended to impose such a requirement.

Section 10709(d) of Title 49 of the United States Code mandates that a "summary of each contract for the transportation of agricultural products (including grain, as defined

in section 3 of the United States Grain Standards Act (7 U.S.C. 75) and products thereof) entered into under this section shall be filed with the Board, containing such nonconfidential information as the Board prescribes." Federal regulations further outline what information is required to be included in the summary that is to be filed with the Surface Transportation Board.[7] See 49 C.F.R. § 1313.6 (1997).

Thus, it is clear that the statute mandates that a summary of the contract be filed with the Board.[8] What is not clear, however, are the consequences for failing to file such a summary. Conrail argues that if no summary is filed, then the agreement is invalid and unenforceable. See Conrail's Opp. at 14-15. Conrail cites no support for this argument, however, beyond the statutory section itself, and gives no explanation for its contention that its failure to file a summary automatically requires a finding that there is no enforceable agreement between the parties. See id. at 15.

Conrail also cites 49 U.S.C. § 11101(d) for the proposition that because there is

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[7]In 1995, when the Interstate Commerce Act was repealed, the Surface Transportation Board, also known as the "Board," replaced the Interstate Commerce Commission. See Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995) (abolishing ICC); 49 U.S.C. § 701 (1997) (creating Surface Transportation Board within the Department of Transportation). The Board, therefore, now oversees rail transportation. See 49 U.S.C. § 10501.

[8]The Interstate Commerce Act, which was repealed in 1995 by the ICC Termination Act of 1995, required the entire agreement to be filed with the Interstate Commerce Commission in order for the agreement to supersede a filed tariff. See 49 U.S.C. § 10713(b) (1994 ed.). The current statute, however, does not require the filing of the agreement and requires only that the summary be filed with the Board. See 49 U.S.C. § 10709(d)(1) (1997); see also Baltimore and Ohio Chicago Terminal R.R. Co. v. Wisconsin Central Ltd., 154 F.3d 404, 410 (7th Cir. 1998) (finding that the Interstate Commerce Act, which has since been repealed, required the filing of the entire agreement, while the "current law, with an immaterial exception, see 49 U.S.C. § 10709(d)(1), does not require that the agreement be filed" with the Board), cert. denied, 119 S. Ct. 1254 (1999).

no "written contract between the parties, any movements of malt provided by Conrail . . . are governed pursuant to statute by Conrail's Malt Transportation Tariff Cr-4195." See Conrail's Memo. at 11. The statute provides as follows:

> With respect to transportation of agricultural products, in addition to the requirements of subsections (a), (b), and (c), a rail carrier shall publish, make available, and retain for public inspection its common carrier rates, schedules of rates, and other service terms, and any proposed and actual changes to such rates and service terms.

49 U.S.C. § 11101(d) (1997). This statutory section does not go as far as Conrail contends it does. The statute provides that a rail carrier must publish its rates for public inspection; it does not mandate that a tariff rate automatically supersedes an oral contract.

Thus, Conrail has not demonstrated that its assertion (that an oral contract for the provision of rail services is superseded in every instance by a tariff rate) is correct as a matter of law.

**B. Did an Enforceable Oral Contract Exist Between the Parties?**

Because the court finds that it is possible that Conrail and Canada Malting could have formed an enforceable oral contract for the provision of rail services, the issue then is whether there was, in fact, an enforceable oral agreement between these two parties for the shipment of malt from Allentown to Chapman. Canada Malting argues that an enforceable oral agreement did exist, while Conrail maintains that the parties never reached an agreement for the long-term provision of rail services from Allentown to Chapman.

With respect to the enforceability of a contract, the United States Court of Appeals for the Third Circuit has stated:

> Under Pennsylvania law, the test for enforceability of an agreement is whether both parties have manifested an intention to be bound by its terms and whether the terms are sufficiently definite to be specifically enforced. Additionally, of course, there must be consideration on both sides. Consideration confers a benefit upon the promisor or causes a detriment to the promisee and must be an act, forbearance or return promise bargained for and given in exchange for the original promise.

Channel Home Centers, Div. of Grace Retail Corp. v. Grossman, 795 F.2d 291, 298-99 (3d Cir. 1986) (citations omitted) (internal quotations omitted). In addition, "a contract must represent a meeting of the parties' minds on the essential elements of their agreement." Courier Times, Inc. v. United Feature Syndicate, Inc., 445 A.2d 1288, 1295 (Pa. Super. Ct. 1982); see also Degenhardt v. The Dillon Co., 669 A.2d 946, 950 (Pa. 1996) (finding that the "formation of a valid contract requires the mutual assent of the contracting parties"). When there is conflicting evidence regarding intent, the question whether the parties formed a completed contract is one for the trier of fact. Field v. Golden Triangle Broad., Inc., 305 A.2d 689, 691-92 (Pa. 1973), cert. denied, 414 U.S. 1158 (1974); see also JMJ Enters. v. Via Venteto Italian Ice, Inc., No. 97-CV-0652, 1998 WL 175888, at *2 (E.D. Pa. April 15, 1998) (recognizing that "when the record contains conflicting evidence regarding intent, the question of whether the parties formed a completed contract is one for the trier of fact"), aff'd, -- F.3d -- (3d Cir. 1999).

Conrail contends that no agreement was ever reached because "Conrail only agreed to apply the $350.00 rate to a few cars" and never consented to a long-term contract. See Conrail's Opp. at 5. According to Conrail, in February, 1997, Semenchuk of Canadian Pacific contacted Ciotti of Conrail to discuss the possibility of handling a few rail cars, known as "straggler" rail cars. See Ciotti Aff. at ¶¶ 2-3. Thus, Conrail

contends that it never intended to switch Canada Malting's cars on an ongoing basis, but agreed to do so only on a few limited occasions as a "courtesy" to Canadian Pacific.

Canada Malting, on the other hand, claims that both parties agreed to be bound to an enforceable long-term agreement to switch Canada Malting's rail cars at a rate of $350 per car. See Canada Malting's Memo. at 6-7. The record does contain evidence that could support a finding that the parties reached an oral agreement to transport the rail cars on a long-term basis at a rate of $350 per car. See Atthill Dec. ¶¶ 11-12 (stating that Conrail had quoted a rate of $350 per car); Semenchuk Tr. at 24-25 (testifying that she did not use the term "straggler cars or misrouted" cars during conversation with Ciotti in February, 1997, in which Conrail quoted a rate of $350 per car); Atthill Dec. ¶ 15 (declaring that, between April and July of 1997, rail cars were transported from Allentown to Chapman and Conrail billed Canada Malting $350 per rail car for this service); Atthill Tr. at 28 (testifying that Canada Malting was initially billed $350 per rail car for the switching service provided by Conrail). Thus, the parties dispute this genuine issue of material fact.

In this case, the issue of the period of time or number of cars for which the parties intended to be contractually bound is a genuine issue of material fact that must be resolved by the fact finder and, therefore, is not appropriate for determination by summary judgment. See Liberty Lobby, Inc., 477 U.S. at 247-48.

**C. Canada Malting's Additional Arguments**

Canada Malting makes several additional arguments urging the court to grant summary judgment in its favor. Canada Malting argues that: (1) the doctrine of equitable estoppel prohibits Conrail from charging any rate other than the $350 rate that was originally quoted by Conrail; (2) the tariff rate is unconscionable; (3) the tariff rate is unenforceable because there was no consideration to support the modification of the original agreement between the parties; and (4) there is no factual basis for Conrail's estoppel claim.

1. Equitable Estoppel

"Estoppel is an equitable doctrine designed to prevent a party from acting in one manner after it has induced another to expect it to act in a different manner." The Travelers Ins. Co. v. Paolino Material & Supply, Inc., 903 F. Supp. 865, 868 (E.D. Pa. 1995) (citations omitted). To prove the defense of equitable estoppel, a party must prove: "(1) a material representation, (2) reasonable reliance upon that representation, and (3) damage resulting from that representation." See Gridley v. Cleveland Pneumatic Co., 924 F.2d 1310, 1319 (3d Cir.) (citing Pane v. RCA Corp., 868 F.2d 631, 638 (3d Cir. 1989)), cert. denied, 501 U.S. 1232 (1991). Because equitable estoppel is an affirmative defense, Canada Malting would bear the burden of proving each of these elements at trial. See Carlson v. Arnot-Ogden Mem. Hosp., 918 F.2d 411, 416 (3d Cir. 1990) (citing Paul v. Lankenau Hosp., 543 A.2d 1148, 1152 (Pa. Super. Ct. 1988)) (finding that equitable estoppel is an affirmative defense). Here, the main issue is whether Canada Malting reasonably relied to its detriment on a representation made by Conrail.

Canada Malting claims that it relied on Conrail's representation that the rate

would be $350 per car because "it never would have agreed to the transportation of its malt products had it known that Conrail would begin to demand a charge of more than $1,700 per car three months into performance of the agreement." See Canada Malting's Memo. at 7.

In response, Conrail argues that Canada Malting had already entered into the long-term contract with Stroh's when it first learned that Canadian Pacific did not serve the Stroh's facility directly and thus learned that it would be necessary to use Conrail's services. See Conrail's Opp. at 10. Therefore, Conrail contends that Canada Malting did not rely on any representation made by Conrail in entering into the contract with Stroh's. As support, Conrail points to the declaration of Atthill of Canada Malting, who stated that: "In February of 1997, after we had contracted with Stroh's, Ms. Semenchuk informed me that, although [Canadian Pacific] can serve Allentown, it cannot serve the Stroh's facility directly. Therefore, a local Consolidated Rail Corporation ("Conrail") switch would be necessary to move the cars the last eight miles to the brewery." Atthill Dec. ¶ 10.

Thus, there is a genuine issue of material fact as to whether Canada Malting detrimentally relied on Conrail's alleged representation that it would charge a rate of $350 per car. Summary judgment is therefore inappropriate and this court is precluded from holding that Conrail is equitably estopped as a matter of law from altering its quoted rate of $350 per rail car. See Liberty Lobby, Inc., 477 U.S. at 247-48.

2. Unconscionability

"Unconscionability is a defensive contractual remedy which serves to relieve a party from an unfair contract or unfair provision of a contract." Wagner v. Estate of Rummel, 571 A.2d 1055, 1058 (Pa. Super. Ct. 1990), alloc. denied, 588 A.2d 510 (Pa. 1991). The test for unconscionability is whether one of the parties lacked a "'meaningful choice' about whether to accept the provision [or contract] in question" and the challenged provision or contract "'unreasonably favor[s]'" the other party to the contract." See Hornberger v. General Motors Corp., 929 F. Supp. 884, 891 (E.D. Pa. 1996).

Canada Malting contends that Conrail's assertion of a tariff charge of more than $1,700 per car is unconscionable because Conrail is unilaterally assessing "more than $1,700 per car to continue to perform exactly the same services that it had been performing for several months for $350 per car . . . ." See Canada Malting's Memo. at 8. Conrail argues in response that "unconscionability is a doctrine which is applied to void an existing contract--not to prove that one exists." See Conrail's Opp. at 13.

The court finds that it is not necessary to decide this issue at this time because this defense will not be applicable until the fact finder determines whether the tariff rate applies to the shipment of goods in this case. See Wagner, 571 A.2d at 1058 (finding that unconscionability is a defense to an unfair contract). If the finder of fact concludes that the tariff rate does apply, the issue of unconscionability can be resolved at that time.

3. Lack of Consideration for Modification of Contract

Canada Malting also argues that Conrail's claim fails because "[t]he extraordinary increase of the price term sought by Conrail is clearly unsupported by any agreement or consideration." See Canada Malting's Memo. at 9. Conrail contends that "there was no

increase in the [contractual] rate, because there was no contractual rate." See Conrail's Opp. at 14.

It is axiomatic that, under Pennsylvania law, "additional consideration or reliance [is required] to support a contractual modification." Barnhart v. Dollar Rent A Car Sys., Inc., 595 F.2d 914, 919 (3d Cir. 1979) (citing Nicolella v. Palmer, 248 A.2d 20 (Pa. 1968)). Therefore, if the parties did, in fact, have a valid contract to ship the malt at a rate of $350 per rail car that was not limited as to the number of cars or time period, then additional consideration would be required to modify the original agreement. If the agreement was limited to "a few cars," then no additional consideration would be required. As discussed above, however, a factual dispute exists as to the terms of the parties' agreement. Thus, any determination as to whether there was consideration to support a modification of the agreement is premature and should not be decided until after the finder of fact has decided the terms of whatever contract existed between the parties originally.

4. Lack of Factual Basis for Conrail's Estoppel Claim

In its complaint, Conrail avers that Canada Malting "represented to Conrail that upon provision of the requested [rail] services, [Canada Malting] would pay to Conrail the invoiced contract price for said services." See Complaint ¶ 11. Conrail alleges that it expended "time, effort, and resources" in reliance on this representation by Canada Malting and consequentially, Canada Malting should now be estopped from denying that it owes Conrail $111,577.20. See id. at ¶¶ 12-13.

Canada Malting now moves for summary judgment on Conrail's estoppel claim,

arguing that the claim fails because "no one at Canada Malting ever indicated in any way that it would pay more than $1,700 per car to Conrail." See Canada Malting's Memo. at 10. Canada Malting contends that it never agreed to pay more than $350 per rail car and Conrail continued to accept $350 per rail car as payment for its services. See id. at 10-11. Thus, Canada Malting claims that Conrail's estoppel claim has no factual basis. See id. at 11.

In response, Conrail argues that even after Conrail informed Canada Malting that the tariff rate would apply to all future shipments, Canada Malting nonetheless continued to ship large numbers of cars to the Stroh's facility. See Conrail's Opp. at 14. Furthermore, Conrail contends that the issue is "not whether [Canada Malting] agreed to pay the $1,700 per car to Conrail. Instead, it is whether a contract, or a tariff rate applies to those shipments." See id. Conrail further asserts that Canada Malting's refusal to pay the $1,700 rate was evidence of the defendant's "bad faith" because Canada Malting was "refusing to pay Conrail the amount that was legally owed for the services performed." See id. at 14 n.18.

In essence, therefore, Conrail contends that it relied on Canada Malting's representation that it would pay the amount invoiced to it for services provided. On the other hand, Canada Malting argues that it made no such representation because it continued to pay the quoted rate of $350 per car rather than the invoiced rate of $1700 per car. Thus, there is a genuine issue of material fact as to whether Canada Malting ever represented to Conrail that it would pay the $1700 per rail car charge for rail services. Summary judgment on this claim is therefore inappropriate and will be denied. See

Liberty Lobby, Inc., 477 U.S. at 247-48.

**D. Conrail's Additional Arguments**

In addition to its other arguments, Conrail also argues that its tariff rates automatically apply to any shipments of Canada Malting's goods after July 31, 1997. See Conrail's Sur-Reply at 5-6. Conrail points to "Paragraph (c) of § 11102" (presumably meaning § 11101) as support for its proposition that a carrier may "increase its rates upon 20 days written notice." See id. Paragraph (c) of § 11101 provides that:

> A rail carrier may not increase any common carrier rates or change any common carrier service terms unless 20 days have expired after written or electronic notice is provided to any person who, within the previous 12 months--(1) has requested such rates or terms under subsection (b); or (2) has made arrangements with the carrier for a shipment that would be subject to such increased rates or changed terms.

49 U.S.C. § 11101(c). Conrail claims that it provided the requisite written notice to Canada Malting through Ciotti's electronic mail message dated July 11, 1997. See Conrail's Sur-Reply at 5-6. Thus, Conrail contends that regardless of what occurred before July 11, 1997, the tariff rate applies "to any shipments which took place twenty (20) days after that date, or from July 31, 1997 forward." See id.

The determination of this issue again depends on the factual determination of whether the parties entered an enforceable private agreement for the shipment of malt at a rate different from the tariff rate and for what period of time or number of cars. If Conrail and Canada Malting did enter such an agreement, then the tariff rate would not alter the agreement. See 49 U.S.C. § 10709(f) ("A rail carrier that enters into a contract as authorized by this section remains subject to the common

carrier obligation set forth in section 11101, with respect to rail transportation not provided under such a contract.") (emphasis added). Thus, it is premature for the court to decide this issue before the finder of fact has determined whether or not a valid contract between Conrail and Canada Malting was formed to transport malt for $350 per car.[9]

## CONCLUSION

Because this case involves disputed genuine issues of material fact, Defendant Canada Malting's Motion for Summary Judgment will be denied. For the same reason, Plaintiff Consolidated Rail Corporation's Motion for Partial Summary Judgment will also be denied.

An appropriate order follows.

[9]Canada Malting also argues that Conrail's tariff rate of approximately $1,700 was unreasonable because this rate is "five times higher than the rate[] originally quoted and [is] applicable to a service that Conrail did not provide." See Canada Malting's Opp. at 10. Canada Malting contends that Conrail is attempting to impose a rate that does not apply to the eight mile rail line that connects Allentown and Chapman, but rather, applies to shipments made from Buffalo or Chicago. See id. at 9. Conrail asserts that the rate charged by Conrail is based on the distance traveled and the weight of the rail car. See Conrail's Sur-Reply at 4. The court, however, need not decide this issue now. If the finder of fact concludes that there was an enforceable private contract, this issue will be moot.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

| | | |
|---|---|---|
| CONSOLIDATED RAIL CORP. | : | CIVIL ACTION |
| | : | |
| v. | : | |
| | : | |
| CANADA MALTING CO., LTD. | : | |
| | : | NO. 98-5984 |

**ORDER**

AND NOW, this day of July, 1999, upon consideration of defendant's motion for summary judgment, plaintiff's response, defendant's reply, and plaintiff's sur-reply thereto, and upon consideration of plaintiff's motion for partial summary judgment, plaintiff's supplemental memorandum in connection with plaintiff's motion for summary judgment, and defendant's response thereto, IT IS HEREBY ORDERED that:

(1) defendant's motion for summary judgment (Document #10 and Document #11) is DENIED; and

(2) plaintiff's motion for partial summary judgment (Document #9) is DENIED.

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William H. Yohn, Jr., J.